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THE SUPREME COURT AND THE CHARTER

The Hon. Mr. Justice Frank Iacobucci
Professor David M. Beatty

University of Toronto - Faculty of Law

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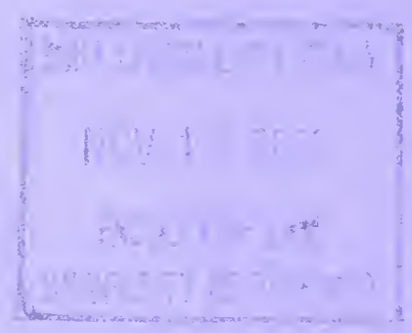
January/Feburary 2001



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FOREWORD

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David M. Beatty

Frank Iacobucci

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Aharon Barak, "The role of the supreme court in a democracy," (1999) 33 *Is. L. Rev.* 1. 54
B. M. McLachlin, "The Charter: a new role for the judiciary?" (1991) 29 *Alta. L. Rev.* 540. 66
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Claire L'Heureux-Dubé, "The dissenting opinion: voice of the future?" (2000) 8 *Cahiers du Conseil Constitutionnel* [translation]. 253
Rudolf B. Schlesinger, *Comparative Law: cases, text, materials*, 4th ed. (Mineola, NY: Foundation Press, 1980) [excerpt] in *Global Constitutionalism Seminar* (New Haven:Yale Law School, September 1996) VI-45. 284
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Boris I. Bittker, "The bicentennial of the jurisprudence of original intent: the recent past" (1989) 77 *Calif. L. Rev.* 235. 287
Henry Paul Monaghan, "Stare decisis and constitutional adjudication," (1988) 88 *Colum. L. Rev.* 723. 291
Mary Ann Glendon, *Rights Talk: the impoverishment of political discourse* (New York: Free Press, 1991) [excerpt] in *Global Constitutionalism Seminar* (New Haven:Yale Law School, September 1996) VI-64. 308
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Bertha Wilson, "Decision-making in the Supreme Court," (1986) 36 *U.T.L.J.* 227; 241-44. 311

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Rules of the Supreme Court of Canada; SOR/83-74; s. 18. 318
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Canadian Judicial Council, *Ethical Principles for Judges* (Ottawa: Canadian Judicial Council, 1998). 23-25, 27-33, 37-40. 377
John Sopinka, "Must a judge be a monk - revisited," (1996) 45 *U.N.B.L.J.* 167. 384
Kirk Makin, "Lamer worries about public backlash: angry reaction could affect judges' decisions, chief justice says" (Feb. 6, 1999) *Globe and Mail* A1, A4. . 389
Antonio Lamer, "Antonio Lamer: should judges hold their tongues? The Chief Justice worries that, by keeping silent, judges are helping misconceptions to spread" (Aug. 25, 1998) *Globe and Mail* A13. 391
Rosalie Abella, "Democracy at work: the case for a strong court" (Apr. 13, 2000) *Globe and Mail*. 392
J. W. McClung, "Right of Reply" [letter] (Feb. 26, 1999) *National Post* A19. 393
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Jus. Michael Kirby, "Attacks on judges - a universal phenomenon," (August 1998) 72 *Aust. L. J.* 599 in *Global Constitutionalism Seminar* (New Haven: Yale Law School, 2000) V-1. 394
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A. Wayne MacKay, "Judicial free speech and accountability: should judges be seen but not heard?" (1993) 3 *N.J.C.L.* 159. 412
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